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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Tyson Foods, Inc. ("petitioner" or "Tyson").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that petitioner and respondents have entered blanket consents to the filing of *amicus* briefs.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in this case because the decisions below endorse the use of statistical sampling to satisfy the predominance requirement of Rule 23(b)(3) by generating a fictional "average" injury to be applied to each class member regardless of whether each one in fact sustained actual injury. This approach undermines Rule 23's requirements and results in classes in which a significant segment of the class has no injury. Moreover, acceptance of such proof in the face of clearly contrary evidence permits plaintiffs to impose liability on a defendant on behalf of class members who never could have proven the defendant liable in an individual trial – in derogation of the Due Process Clause and the Rules Enabling Act. The holdings below also contravene *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and other recent Supreme Court precedent. For all of these reasons, they should be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below is one of several appellate court rulings over the last few years that have essentially elevated fiction over fact, endorsing class actions based on expert testimony that is at odds with actual facts, and thereby paving the way for uninjured class members to be compensated for injuries they never experienced.

Plaintiffs, current and former employees at Tyson's pork-processing plant in Iowa, allege that Tyson failed to compensate them for overtime spent donning and doffing personal protective equipment ("PPE"), violating the Fair Labor Standards Act ("FLSA") and the Iowa Wage Payment Collection Law ("IWPCL"). Pet. at 6. Plaintiffs claimed that they could prove Tyson undercompensated all class members using the following common proof: (1) a study by Dr. Kenneth Mericle that purportedly calculated the average amount of time Tyson employees spent on donning/doffing activities by measuring the time it took a small and non-representative sample of employees to do so; and (2) a calculation by Dr. Liesl Fox of the aggregate overtime compensation owed, which assumed that all class members spent the average amount of time calculated by Dr. Mericle and applied that amount to Tyson's pay records for the class members. *Id.* at 7-8.

The district court agreed, even though the record showed that the employees' donning and doffing activities varied widely. In fact, at the trial that ensued, the few class members who testified confirmed that each wore different PPE depending on their jobs and personal preferences – and that they

spent different amounts of time, ranging anywhere from two to twelve minutes, each time they engaged in donning/doffing activities. *See* Pet. at 9, 16 (citing Tr. 598, 611, 634, 641, 705-06, 708-09). Moreover, Dr. Fox testified that even if Dr. Mericle's calculated averages were applied to every class member, the class included over 212 members who did not suffer any injury because the additional time still did not result in those employees working more than 40 hours in a single week.

A divided panel of the Eighth Circuit upheld class certification and a classwide verdict of $2,892,378.70, which totaled $5,785,757.40 with the addition of liquidated damages. *See* Pet. App. 6a. While the majority echoed the district court's observation that "individual plaintiffs varied in their donning and doffing routines," Pet. App. 8a, the court held that plaintiffs could rely on the "inference" that they each spent the "average donning, doffing, and walking times" calculated by Dr. Mericle in order to calculate an aggregate amount of uncompensated work time, *id.* 11a. In embracing this inference, the Eighth Circuit endorsed a class that included at least *hundreds* of uninjured employees by plaintiffs' own expert's count. Indeed, the number is likely even higher because, as Judge Beam explained in his dissent, the jury ultimately awarded less than half the damages plaintiffs requested based on their experts' calculations, indicating that the jury disagreed with plaintiffs' "over-generous time study conclusions" and that "well more than one-half of the certified class" was unlikely to have been actually injured. Pet. App. 125a.

Certification of such a heterogeneous class infringed Tyson's due-process rights by stripping it of

its right to challenge the fundamental injury element of the individual class members' claims. In addition, by eliminating the substantive requirement of injury solely by dint of the class device, the Eighth Circuit violated this Court's command, based on the Rules Enabling Act, that Rule 23 not be interpreted to "'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

If left to stand, the Eighth Circuit's ruling would significantly harm American manufacturers. The use of statistical sampling where, as here, there is a strong record that any alleged harm is individualized opens the door to over-compensation – i.e., payments to individuals who were never injured by a defendant's conduct. Such a regime will promote more abusive and costly litigation that will damage American businesses and their shareholders and employees, as well as the consumers who buy the products they make. This Court should reverse the circuit court's error to prevent these results.

ARGUMENT

I. The Eighth Circuit's Decision Endorsed A "Trial By Formula" That Abridged Tyson's Due-Process Rights And Violated The Rules Enabling Act.

The Eighth Circuit's decision to affirm class certification based on unrepresentative, statistical sampling evidence was erroneous because it undermined Rule 23's requirements for class certification and foreclosed Tyson's right to contest individual class members' claims, in violation of its due-process rights and the Rules Enabling Act.

As this Court made clear in *Wal-Mart Stores, Inc. v. Dukes*, a basic prerequisite of a class action is that the plaintiff must "demonstrate that the class members 'have suffered the same injury.'" 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). This is a demanding requirement, particularly in the context of Rule 23(b)(3), which is "an adventuresome innovation" that is designed "for situations in which class-action treatment is not as clearly called for." *Id.* at 2558 (internal quotation marks and citation omitted). Where the evidence shows that some members of the class are not injured, class treatment is improper because any certified class must preserve the defendant's right to present "defenses to individual claims," a right rooted both in the Rules Enabling Act and basic notions of due process. *Id.* at 2561; *e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (mem.); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. [N]o reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (internal quotation marks and citations omitted); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action must "leave[] the parties' legal rights and duties intact and the rules of decision unchanged").[3]

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[3] Although the FLSA claim was allowed to proceed as a "collective" action rather than class action pursuant to the Act's collective-action provision, it is clear that the same uniformity of injury is required. As the Eighth Circuit recognized, before a collective action is approved, a court must determine that the members of the collective action are "similarly situated," which

This Court has already squarely held that the right to defend against individual claims precludes the use of expert evidence based on a "sample set of the class members" to prove classwide injury unless the defendant's right to present individualized defenses is preserved. *Dukes*, 131 S. Ct. at 2561. As the Court explained, such a "novel project" of "Trial by Formula" contravenes the defendant's right to litigate its defenses. *Id.* And as the Court again emphasized two years later, courts have a duty to rigorously analyze expert evidence offered to prove classwide injury or damages at the class-certification stage. The Court expressly rejected the notion that "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Comcast*, 133 S. Ct. at 1433. Rather, any model purporting to outline the compensation due to each class member must be consistent with the scope of liability the plaintiff is attempting to prove as to each class member. *Id.* at 1434-35.

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requires consideration of "'(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations.'" Pet. App. 7a (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001)). *See also, e.g., DeSilva v. N. Shore-Long Island Jewish Health Sys.*, 27 F. Supp. 3d 313, 327-328 (E.D.N.Y. 2014) (explaining that, in an FLSA action, it "is senseless to proceed as a collective action when Plaintiffs' experiences vary from day to day, and from individual to individual" because the defendant "will not have an opportunity to meaningfully cross examine opt-in Plaintiffs," depriving it of its "due process right to present its full defense").

The courts below directly contravened these precedents by endorsing the use of "average" damages uniformly on behalf of all members of a heterogeneous class. Most fundamentally, the lower courts erred by approving class treatment even though a significant number of uninjured individuals stood to recover compensation solely by dint of the class device. The crux of plaintiffs' claims was that they were deprived of overtime pay in violation of the FLSA and the IWPCL. *See* 29 U.S.C. § 207(a)(1); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (explaining that an FLSA plaintiff had "the burden of proving" that he performed work "for which he [or she] was not properly compensated"); Iowa Code § 91A.3. And as plaintiffs' experts conceded, *hundreds* of employees were not owed any compensation under plaintiffs' theory of the case because, for example, they donned and doffed during compensated production time or (even including the donning and doffing time) worked fewer than 40 hours a week and thus had no unpaid overtime. *See* Pet. at 11, 18. As a result, and as recognized in Judge Beam's dissents below, the district court's judgment stands to award compensation to hundreds of individuals with no legally cognizable injury, Pet. App. 22a, 24a, 126a, in effect enlarging substantive rights and violating Tyson's due-process rights by forcing it to pay individuals to whom it is not liable under the applicable substantive law.[4]

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[4] This approach likewise abridges the rights of any class member who worked more than the alleged average amount of uncompensated time and thus would be entitled to seek more extensive relief in individual proceedings.

The Eighth Circuit brushed these concerns aside, asserting that plaintiffs' experts were permitted to make an "inference" that each individual employee was injured and spent the same amount of time donning and doffing PPE as the fictional "average" employee in Dr. Mericle's time study. Pet. App. 8a. The court believed that use of such an inference was allowable under *Anderson v. Mt. Clemens Pottery*. *See* Pet. App. 8a. But *Anderson* held no such thing. Indeed, *Anderson* expressly confirmed that an employee suing under the FLSA has a "burden" to show "that he has *in fact* performed work for which he was improperly compensated." 328 U.S. at 687 (emphasis added). It is only the "amount and extent" of such uncompensated work – i.e., damages, not injury itself – that may be proven "as a matter of just and reasonable inference." *Id.* And even as to such inferential proof, the defendant has a right "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88.

Under this framework, plaintiffs' expert evidence fell far short of establishing uniform injury – notwithstanding *Anderson* – for several reasons. For one thing, *Anderson*'s inference applies at most to damages, not injury. In other words, the inferences made by plaintiffs' experts could serve only to prove the extent or amount of damages for plaintiffs who had already proven they worked uncompensated hours and were uncertain only as to the number of those hours. Moreover, even if *Anderson* were construed more broadly to permit an inference of injury as well as the extent of damages, no such inference would support class treatment here because any in-

ference was "negative[d]" by plaintiffs' expert's own testimony, which conceded that *hundreds* of class members had not suffered any injury. No inference of universal injury could survive this concession; to hold otherwise would effectively make the inference irrebuttable and eliminate the element of injury from the plaintiffs' claims, in violation of Tyson's due-process rights and the Rules Enabling Act. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 446, 452-53 (1973); *Francis v. Franklin*, 471 U.S. 307, 317 n.5 (1985) (explaining that an "*irrebuttable* presumption" goes beyond mere burden-shifting and "eliminates an element from the case"). In short, the class never should have been certified because plaintiffs had no evidence to satisfy the threshold requirement that "the class members have suffered the same injury." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks and citation omitted).

Even if universal class injury could somehow be "inferred," plaintiffs' evidence still could not support class treatment because it failed to account for the significant variations within the class with respect to donning and doffing times. The seed for this fatal flaw was in the design of the damages model, which was not based on a representative sample of the class. By his own admission, Dr. Mericle failed to ensure that his sample pool of workers represented proportionally the different jobs held by the putative class members. *See* Pet. at 10 (citing Tr. 1105-08, 1050). Indeed, Dr. Mericle failed to use any sampling formula employed in statistical analyses at all; he and his team merely observed whichever employees were around and performing donning/doffing activities. *See id.* (citing Tr. 912).

The failure to use a representative sample resulted in a corresponding failure to account for differences in donning and doffing time by position, despite the fact that Tyson's facility employs 1,300 employees, performing over 420 distinct jobs in two different departments, which entail the use of different sanitary items and PPE. *See id.* at 4; *id.* at 10 (citing Tr. 1105-08, 1050). Indeed, even Dr. Mericle testified that these differences led to "'a lot of variation'" because "'some of [the workers] put on more equipment than others.'" *Id.* at 9 (quoting Tr. 1158, 1144). For example, his observed times for processing floor employees donning their PPE ranged from half a minute to ten minutes and his observed times for slaughter floor employees doffing their PPE ranged from 0.2 to 5.7 minutes. *Id.* at 9 (citing Pet. App. 137a, 138a). As such, plaintiffs' approach to proving damages was impermissible because it offered no assurance that the damages model was based on estimates of excess hours worked that matched – or even approached – the hours actually worked by the class. *Cf. Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (concluding that "what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

In this respect, the lower courts committed the same type of error that this Court identified and corrected in *Comcast*. As the Court explained in that case, a damages model that was based on four theories of liability was not a valid basis for certification of a class that was proceeding on only one of those theories because "a model purporting to serve as evidence of damages in [a] class action must measure

only those damages attributable to" the operative theory of liability. 133 S. Ct. at 1433. And if "the model does not even attempt to do that, it cannot possibly" be used to prove class damages. *Id.* Here, too, plaintiffs' experts did "not even attempt" to measure damages in a manner that aligned with the limited scope of injury to each class member they acknowledged resulted from the plaintiffs' theory of liability and, on this additional ground, the courts below erred in sustaining class certification.

For all of these reasons, the Court should reverse and in doing so, remind the lower courts that use of statistical sampling to satisfy class certification requirements is improper, particularly where it leads to the inclusion of uninjured class members in the certified class.

II. The Eighth Circuit's Decision Is Damaging To American Businesses And Consumers.

The decision below also cries out for reversal because its imprudent approach to predominance and embrace of overbroad classes will promote the filing of unwieldy, overbroad class proceedings, to the detriment of American businesses, their workers and shareholders, and consumers.

As Tyson notes, the same issues of overbreadth and misaligned damages models presented by this case frequently arise in consumer-fraud class actions. Pet. at 31-32. Indeed, relying on logic similar to the Eighth Circuit's here, the Sixth and Seventh Circuits sanctioned class actions in two recent washing-machine cases despite record evidence that the vast majority of the class members never experienced the product defect asserted by the named plaintiffs. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir.

2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013). As one commentator has noted, while this Court "has been taking steps to eliminate these overbroad class actions," "a misapplication of precedent by the circuit courts has rendered the Supreme Court's efforts futile." Christine Frymire, *Class Actions a Thing of the Past . . Or Are They? A Look at the Circuit Courts' Application of Comcast v. Behrend*, 48 J. Marshall L. Rev. 335, 336-37 (2014).

As demonstrated by the facts in this case, overbroad class actions undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they could not recover if they brought a similar lawsuit as individuals. And in a consumer-fraud class action, recovery by uninjured consumers results in overcompensation, which is as much a problem for consumers as it is for businesses. In general, the potential costs of injury and damages to a small number of consumers are "incorporated into the price of the product and spread among" a large group of purchasers. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991). But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers and other businesses are required to hike the price of goods and services in order to remain solvent. *See id.* The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price in the first instance." *Id.* As Judge Easterbrook similarly explained in the Seventh Circuit's decision in *Bridge-*

stone/Firestone, allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions and injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 n.1 (7th Cir. 2002).

Overbroad class actions and the high litigation costs that come with them also adversely affect employees by restricting businesses' ability to allocate resources to creating new jobs and expanding sales. *See, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted). This sort of economic distortion – which Judge Wisdom saw "little reason to adopt" – is exacerbated by overbroad class actions.

Recognizing these dangers, some courts have rejected overbroad class actions. For example, a number of federal courts have staunchly applied the typicality requirement of Rule 23 to bar class certification unless everyone in the class has suffered the same alleged injury. *See, e.g., Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *20-21 (D.S.C. Dec. 21, 2012) (recognizing that the proposed nationwide class "would . . . include those persons and entities who never experienced

problems" with their vehicles, highlighting "the lack of typicality among putative class members"); *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987, at *14 n.2 (S.D. Cal. June 19, 2014) (commonality and typicality not satisfied where the proposed class was "woefully overbroad because it incorporate[d] class members who suffered injury and those that did not"). Nonetheless, and despite this Court's precedents, overbroad classes are becoming more prevalent.

The Court should reverse the decision below to clarify that overbroad class actions are impermissible and to prevent the harm caused by such actions to our judicial system, our economy and American manufacturers, consumers, and workers.[5]

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[5] Notably, the Seventh Circuit has already witnessed the problems inherent in an embrace of overbroad class actions like the one in this case. In litigation alleging that Pella windows contain a defect making them prone to leaking, the defendant opposed certification on the ground that the class was overbroad because most windows did not manifest any problem. Nevertheless, the Seventh Circuit held that certification was proper on the theory that the issue of defect was common to the class – even if the alleged defect never manifested in most windows. *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (per curiam). The result was a settlement in which virtually none of the class participated and attorneys were awarded fees that were nearly ten times greater than the maximum aggregate class recovery – an outcome the Seventh Circuit lamented as "inequitable – even scandalous." *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (noting that 225,000 notices were sent to class members but only 1276 claims were made, resulting in a total claim of $1.5 million by class members compared to a fee award of $11 million). This Court should recognize what the Seventh Circuit has not – that such "scandalous" outcomes are the inevitable result of the certification of overbroad cases like this one.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Tyson Foods, Inc., the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

Corporate Members Of The Product Liability Advisory Council

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Altec, Inc.
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Astec Industries
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The Goodyear Tire & Rubber Company
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Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company

Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teleflex Incorporated
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation

Zimmer, Inc.